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Latin America's First Modern System of Lay Participation: The Reform of Inquisitorial Justice in Venezuela

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The Reform of Inquisitorial Justice in Venezuela

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I. Introduction

Latin America has long been in need of criminal procedure reform. Well-placed geographically, culturally and politically to be a laboratory for legal innovation—with its historical-cultural roots in the European Civil Law and the influence exercised by the U.S. Constitution and Bill of Rights at the time of its liberation—one would think that the best aspects of Europe’s inquisitorial system and America’s Common Law traditions could have developed there. This did not happen. Over a century and a half of dictatorships, civil wars, screaming inequality and poverty were not the conditions for the realization of the principles envisioned in the first constitutions and codes of criminal procedure of the newly independent states which arose from the Spanish and Portuguese empires.

The first Constitution of Spanish America, that of the Republic of Venezuela in 1811, provided in its Art. 161: «Congress, in the shortest time possible, shall establish a detailed law on jury trial for criminal and civil cases...» It also recognized the presumption of innocence, the right to be heard, to confront witnesses, compulsory process, the right to counsel and the privilege against self-incrimination. The right to jury trial appeared in the Venezuelan Constitutions of 1819,

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1821, 1830 and 1858 and in almost all the Codes of Criminal Procedure of Venezuela until the beginning of the 20th Century\(^2\). For instance, the Code of Criminal Procedure of 1897 contained a Book of 80 articles dedicated to jury trial, but the legislator left it up to the individual states to decide whether to implement the procedure. None did\(^3\).

Up until recently Latin America was, with few exceptions\(^4\), an area with no citizen participation in the administration of justice and also, with few exceptions, with a purely inquisitorial, written procedure. The Córdoba code of 1939 and the 1988 Model Code of Criminal Procedure for Ibero-America\(^5\) gave the impulse for reforms resulting in new Codes of Criminal Procedure in Guatemala, Argentina and Colombia and drafts in other countries\(^6\), which have taken great steps to introduce an oral and public trial and strengthen the rights of the accused during the preliminary investigation and the trial.

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\(^2\) ERIC LORENZO PÉREZ SARMIENTO (n. 1), 19.

\(^3\) Informe de la Comisión Legislativa Sobre el Proyecto de Código Orgánico Procesal Penal Discutido y Aprobado por la Comisión, in Proyecto de Código Orgánico Procesal Penal. Exposición de Motivos e Informe, Caracas 1997, 28. A similar sorry state of affairs predominated, as well, in Argentina, where the still-in-force 1858 Constitution provides for trial by jury, but that country’s legislators also never enacted the implementing legislation. RICARDO J. CAVALLERO/EDMUNDO S. HENDEL, Justicia y Participación: el juicio por jurados en materia penal, Buenos Aires 1988, 43 et seq.


\(^5\) Código de procedimiento penal para la provincia de Córdoba, Ley no. 3,831, 28 Aug. 1939, see JULIO B.J. MAIER, Derecho procesal penal I, Fundamentos, 2d. Ed., Buenos Aires 1999, 415 et seq. Even Brazil’s jury system was grafted on to a predominantly written inquisitorial trial procedure. The trial begins with the presiding judge reading the entirety of the investigative dossier (or those portions selected by prosecution and defense) to the jury, § 466 CPP-Brazil. The prosecution and defense are then limited to calling five live witnesses each, § 421 CPP-Brazil. Nicaragua’s system is similar. El Proceso Penal (n. 4), 18.


The boldest reforms in this respect have been, however, in Venezuela, with the promulgation of the Código Orgánico Procesal Penal in 1998 (hereafter COPP). Under the guidance of Luis Enrique Oberto, a Venezuelan legislator, and with the generous help of the German Konrad Adenauer Fund, the Max-Planck-Institute for Foreign and International Criminal Law, the World Bank and North American jurists, work began in 1995 to completely reform the written, inquisitorial system which prevailed in Venezuela. Under the superseded Código de Enjuiciamiento Criminal, promulgated in 1926, the same judge who supervised the police’s collection of evidence and was responsible for authorizing invasions of constitutional rights, also bound the case over for trial and acted as presiding judge at the “trial” and, as expressed in the «Exposition of Reasons» to COPP: «The gaze of the judge goes no further than the pages of the file; he does not know the face of the defendant; he never sees the gestures or hears the voice of a witness or an expert».

What emerged was a modern, eminently garantista Code of Criminal Procedure, which, in its resolute rejection of its inquisitorial past and its embrace of accusatory, adversary and abbreviated-consensual procedures looks much like the Italian Code of Criminal Procedure of 1988, with the exception of the important fact that it links this transition with the introduction of the classic jury court, the institution which preserved the accusatorial–adversarial tradition during the reign of the inquisition on the European Continent, and which, arguably, provides the

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8 Oberto (n. 7), 23–160.
9 Código de Enjuiciamiento Criminal (1926), reprinted in Código Latinoamericanos de Procedimiento Penal, ed. by José María Rico/Luis Salas, San José, Costa Rica 1991 (hereafter CEC).
10 Jorge L. Rosell Sensen, El Juicio oral y público (La audiencia contradictoria), in: Código Orgánico Procesal Penal, Comentado con 7 Monografías, ed. by Magaly Vásquez González, Caracas 1998, 163.
11 Exposición de Motivos (n. 1), 3.
13 Ferrajoli (n. 12), 577. On the thesis, not shared by Ferrajoli, that the jury court, bifurcated as it is into a professional judge of the law, and lay judges of facts and guilt, is the most suitable form for an accusatorial–adversarial system of criminal procedure, see Stephen C. Thaman, Europe’s New Jury Systems, in: World Jury Systems, ed. by Neil J. Vidmar, Oxford 2000, 319 et seq. As to the other two types of systems, the inquisitorial and the «mixed» system, see Ferrajoli (n. 12), 628, one could say that the «mixed court» with lay assessors is more suitable to the latter, and the purely professional court to the former.

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soil most suitable for the blossoming of a truly accusatorial, adversarial oral trial in which the presumption of innocence is more than just an empty formality. This article will describe the new Venezuelan jury and mixed court systems which were introduced by COPP in the context of the code’s radical transition to accusatorial and adversarial procedure.

II. Composition and Jurisdiction of the new Venezuelan Criminal Courts

COPP has created three different types of trial courts, depending on the severity of the crimes to be adjudicated. Crimes punishable by up to four years imprisonment will be tried in the first instance by a single judge with no lay participation (§ 60 COPP). Crimes punishable by from four to sixteen years deprivation of liberty will be tried by a "mixed court" composed of one professional judge and two lay assessors (§§ 16, 158 COPP)14. Finally, crimes punishable by more than 16 years imprisonment are tried by a jury court, composed of one professional judge and nine jurors (§ 164 COPP)15.

III. The Selection of Lay Judges

Lay assessors and jurors in Venezuela are selected from the same voter registration roles in precisely the same manner. They must be citizens, at least 25 years of age (they may excuse themselves if they are 70 years of age or older), and must have an average, diversified and professional education. Politicians or anyone connected with the legal profession or law enforcement are excluded from participation (§§ 148, 149, 151 COPP). Although the procedure for selections of jurors in Ve-

14 This is the same form as the German Schöffengericht, § 29 GVG, which hears cases punishable by from one to three years imprisonment, all others being heard by a single judge. §§ 25, 74 GVG. The mixed court survived a constitutional attack by the Federation of the College of Lawyers of Venezuela in a decision by the Supreme Court of Venezuela (Tribunal Supremo de Justicia) (hereafter TSJ) on May 11, 1999. Cited OBERTO (n. 7), 194.

15 This is the same constellation as the new Spanish jury court. § 2 Ley Orgánica 5/1995, del Tribunal del Jurado, BOE no. 122, of May 23, 1995 (hereafter LOTJ [Spain]), all cites from Ley de Enjuiciamiento Criminal y otras normas procesales, ed. by JULIO MUÑOZ ESPARZA, Pamplona 1998, 243 et seq. The new Russian jury court, on the contrary, consists of one professional judge and twelve jurors. § 440 Ugolovno-Protsessual’nyy Kodeks RSFSR, all cites from Ugolovno-Protsessual’nyy Kodeks RSFSR s prilozheniiami, ed. by N.M. KIBNIS, 2d. Ed. (Jurisprudentsiia), Moscow 2001 (hereafter, UPK-Russia).
nezuela is similar to that in Spain, Russia and the U.S., the procedure for selecting lay assessors deviates from the German model in two significant ways: the lay assessors are chosen at random from electoral lists for each trial and, like jurors, serve only on one case and are then excused (§§ 152, 160 COPP). On January 15, 1999, the first list of three million prospective jurors and lay assessors was compiled, and winnowed down to 199,688 persons by the time the first oral trial took place on July 23, 1999, before an overflowing courtroom. Venezuelan citizens were at first reluctant to participate as jurors and lay assessors. There is good reason for this, for Venezuela is plagued by an outrageous level of violent crime. Judges often had to summon several panels of prospective lay participants to seat a jury due to refusal to answer summonses or successful pleading of excuses for not serving.

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16 Thaman (n. 13), 326 et seq.
17 In Germany, §§ 36–42 GVG, lay assessors are chosen in a directly political manner by local government officials thus guaranteeing effectively control of the types of persons chosen. They are also chosen for four-year periods, to sit in 12 court sessions a year, § 43 GVG, and they thus gradually gain legal experience and become more judge-like. A similar model was used in the Soviet Union, Stephen C. Thaman, The Resurrection of Trial by Jury in Russia, Stan. J. Int'l L. 31 (1995) 61, 67. Venezuela rejected this model, fearing the lay assessors would become professionalized. Pérez Sarmiento (n. 1), 215.
20 Oberto (n. 7), 213. It was a military case. Jury and mixed court trials followed soon thereafter.
21 Interview with Shirley Páez, Director of the Office of Citizen Participation, Caracas, March 8, 2001, in the Caracas Criminal Court. 927 citizens were interviewed by the newly established Office of Citizen Participation and 54.29% of those questioned said they had doubts about participating. Encuesta Inicial para Escabuces y Jurados. República Bolivariana de Venezuela. Tribunal Supremo de Justicia. Dirección Ejecutiva de la Magistratura. Oficina Nacional de Participación Ciudadana.
23 María Amanda Pérez de Motabarán, Judge in the Caracas Criminal Court, reported that she had to summon four or five panels to finally pick a jury and that jurors are especially afraid to sit on murder and drug trafficking cases. Interview, March 14, 2001, in Caracas Criminal Court. Jean Pierre Seguiera, Director of Citizen Participation in the State of Zulia, said that it often takes two or three panels to seat a jury in his state. Interview, March 13, 2001, in Maracaibo Criminal Court. It took Judge Isabel Hernández Calderón of the Maracaibo Criminal Court three months and three panels to finally seat a jury in the first case she presided over. Interview, March 13, 2001, in Maracaibo Criminal Court.
VII. The Taking of the Evidence

The dominant philosophy of the new Venezuelan criminal trial is that there should be only one «trier of the facts», that of the trial court; whether in the form of single-judge, mixed or jury court. These facts should not be rehearsed, pre-packaged and evaluated by another «trier of fact» during a preliminary investigation, but presented, with but few exceptions, once, in oral form, to the trial court. The dossier of the preliminary investigation is not sent to the court and is not read by the presiding professional judge, who thus, when acting as a trier of fact in the single-judge and mixed courts, will be able, in a juror-like manner, to actually give the defendant the benefit of the presumption of innocence, for he or she will know nothing of the facts of the case and will be less prone to use her residual inquisitorial powers (to question, request new evidence) to follow up the theories of the investigating officials. The trier of fact, whether jury or

24 Under the superseded CEC, the preliminary investigation was the centerpiece of the procedure and the «trial» devoid of any substantive content, a «ritual without meaning.» The human being was lost under hundreds of pages of distilled bureaucracy. Exposición de Motivos (n. 1), 2–3.

25 The exceptions relate to evidence which cannot be repeated at trial: identifications, searches and seizures, and depositions of witnesses who may not be available for trial. In all these situations, the defendant and defense counsel have a right to be present. § 316 COPP. Indeed, the defense has a qualified right to be present during the conduct of all investigative acts, § 315 COPP, and, in the few cases where this is not possible, to be advised of the results within 10 days. § 313 COPP. These provisions are similar to those relating to incriminandi probatori in §§ 392, 394, 401, 403 of the Italian Codice di Procedure Penale (hereafter CPP-Italy), all cited from Codice di Procedura Penale e normativa complementare, ed. by GIULIO UBERTIS, Milano 2000, and to the procedures used in the new Spanish jury courts. See STEPHEN C. THAMAN, Spain Returns to Trial by Jury, Hastings Int'l & Comp. L. J. 21, 241, 281 et seq. (1998).

26 The «orality» guaranteed by § 14 COPP is not the «pseudo-orality», see SENSHEIN (n. 10), 152–53, quoting from ZAFARONI, of the trial based on the investigative dossier, as exists in Germany and many other neo-inquisitorial systems, but one where, as is stated in § 340(2) COPP, «the court shall not admit the presentation of writings during the public hearing.» The main exceptions are for «preconstituted evidence» under § 316 COPP, § 341 COPP.

27 This is also true in Italy and in Spanish jury cases, see THAMAN (n. 25), 281 et seq. «The intention of the legislator, clearly articulated in the COPP was to eliminate as much as possible the records, the written, the file, so as to avoid any pretext that could serve for a return to the written system once the Code entered into force.» Id. at 154. SENSHEIN (n. 10), 154.

28 § 75(1) of the superseded CEC read: «The acts effectuated by the judicial police, including testimonial evidence, have probative force unless they are disproved during the trial.» Under such a system can one, with a straight face, say that there is a presumption of innocence? The burden was clearly on the defendant to disprove the documentary evidence.

29 The Venezuelan judge still technically has the duty to ascertain the truth (§ 13 COPP), may question witnesses, experts and the defendant after the parties have done so (§ 357 COPP) and may also, in exceptional cases, call for the introduction of new evidence but should «take care not to replace with this measure the activity of the parties» (§ 360 COPP). For an opinion that these powers should only be used to benefit the defendant, see PEREZ SARMIENTO (n. 1),
mixed court, will decide only on the basis of first-hand evidence presented in
court or, exceptionally, evidence gathered by investigative officials by virtue of
legal, judicially authorized invasions of the protected rights of the defendant. The
elimination of the inquisitorial pretrial interrogation of the suspect as a means of
proving guilt, and the imposition of strict Miranda-warnings to that end, will also
spare the triers of fact having to decide between the oral declaration of the defend-
ant and the proverbial written confession obtained in secret by law enforcement
inquisitors, a deplorable type of trial which used to be standard fare in the mixed
systems of Continental Europe.

Though the new Venezuelan procedure is declared to be «adversary» in charac-
ter (§ 18 COPP), the trial still begins with the judge asking the defendant if he
wishes to make a statement in response to the charges. The new code allows lay
assessors to question the defendant, if he or she agrees to testify, and all witnesses
and experts (§ 162 COPP) but does not allow jurors to ask questions (§ 173
COPP).

390. On how the presiding judge's study of the investigative dossier undermines the
presumption of innocence and his or her neutrality when acting as trier of fact (in single-judge
or mixed courts, in countries like Germany or Russia), see CLAUS ROXIN, Über die Reform
des deutschen Strafprozessrechts, in: Festschrift für Gerd Jauch zum 65. Geburtstag, Munich
1990, 198 ff.; BERND SCHÜNEMANN, Reflexionen über die Zukunft des deutschen Strafverfah-
rens, in: Festschrift für Gerd Pfeiffer, Köln/Bonn/München 1988, 475 ff.; on how the
judge then infects the lay assessors in the mixed court, MIRJAN R. DAMASKA, Evidence Law
Adrift, New Haven 1997, 72 ff. 30

§§ 207, 214 COPP, like § 191 CCP-Italy and § 69 UPP-RSFSR, provide for a prohibition
of the use of any evidence gathered in violation of COPP, the Constitution or international
treaties. The doctrine of «fruit of the poisonous tree» is also statutorily anchored. § 213 COPP.

§ 128 COPP provides for admonitions of the right to remain silent and that «the declaration
is a means for his defense.» For a similar provision see §§ 65(2) CPP-Italy. §§ 122, 134 COPP
provide for the right to have counsel present during all investigative acts. In general, see

This is still the standard form of trial today in Russia. The accused usually «confesses», and often
due to threats, promises or outright torture. HUMAN RIGHTS WATCH, Confessions at Any Cost:
Police Torture in Russia, New York 1999. The Russian Supreme Court has, in its recent juris-
prudence, outrageously prevented defendants or their lawyers from mentioning illegal practices
before the jury, to convince them to believe their trial testimony, if the trial judge has ruled
the confession to be admissible. STEPHEN C. THAMAN, Trudnosti zashchity v rossiyskikh sudakh:
ostorozhnye sovety amerikanskogo advokata, in: Zashchita po уголовному делу, ed. by YE.YU.
L'vova, Moscow 1998, 184, 189 et seq.

§ 349 COPP. This vestige of inquisitorial procedure, which arguably violates the presumption
of innocence (since no evidence has yet been presented to rebut), still exists in the Russian
and Spanish jury systems. See THAMAN (n. 13), 334-35.
V. Evaluation of Evidence: Verdict and Judgment

In jury cases, the new Venezuelan law follows the Continental European tradition of submitting to the jury a «question list», or special verdict containing questions related to the factual proof of corpus delicti, the identity of the defendant as perpetrator, and guilt. The question list should also contain questions related to any possible excuses or justifications or mitigating and aggravating circumstances in relation to each charged crime and defendant. The formulation of the question list is crucially important in Continental European jury trials for it must establish the logic of the jury's decision in relation to the constituent elements, both actus reus and mens rea, of the charged offenses and thus provide the sentencing judge with the factual basis for legally qualifying the verdict and imposing judgment. Judges have struggled with this task in the new Spanish and Russian systems. The situation is no different in Venezuela. Judgments of the jury courts, invariably in cases of aggravated murder, have been reversed for complete failure to submit a question list to the jury, for refusing to include a question related to an affirmative defense, or for including legal questions instead of merely questions of fact. Whereas in the U.S. the jury is expected to apply the law to the facts they deem to be proved and reach a simple verdict of «guilty» or «not-guilty» as to the charged statutory offense, the Venezuelan law requires the jury to determine guilt or innocence of the act charged and the presence or absence of mitigating or aggravating factors, but leaves the legal qualification of the act.

§ 175 COPP is quite laconic in its phraseology: «the presiding judge shall indicate in writing to the jurors the facts and circumstances about which they must decide in relation to the defendant.» In contrast, the types of questions which must be answered by the new Spanish and Russian juries are specifically spelled out in the law. See Thaman (n. 13), 338 et seq. The Venezuelan Supreme Court reversed a judgment of a jury court in which the judge only submitted the question of guilt to the jury, without questions related to the factual underpinnings of the case. TJS No. 1255 (October 10, 2000) (<http://www.tjs.gov.ve/Decisiones/scp/Octubre/1255-101000-C00994.htm>). The court elaborated: «The sentencing judge should formulate a question list which through its answers would permit the clear specification of the acts committed by each of the defendants, the intent of those acts, in order to in that way establish the respective crimes and declare the defendants guilty or innocent.»

See Thaman (n. 13), 338 et seq.


§ 165 COPP. See also § 52 LOTJ (Spain); § 449 UPK RSFSR. A two-thirds vote is needed to establish guilt. A qualified majority of 7 or the 9 jurors is required for a guilty verdict in Spain, § 59 LOTJ-Spain, and a simple majority of 7 or the 12 jurors in Russia. § 454 UPK.
to the professional judge following the return of the verdict. So far, however, the practice of Venezuelan judges and juries appears to be rather improvisational and muddled. Instead of submitting numbered lists of questions to the jury, the judges in some cases have given the jury a mere summary of the facts as argued by the prosecution and defense and mixed in citations from the law in the form of instructions or even, with no authority in the law, included their own legal qualifications of the facts.

If the jury's answers to the questions are contradictory, the jury should be sent back to the jury room to correct the contradictions. Thus, if the jury found the issues of corpus delicti and perpetration by the defendant to have been proved and recognized no guilt-excluding facts, and yet found the defendant not guilty, the jury in Venezuela (and Spain) could be asked to correct what could have been the jury's attempt to nullify and acquit despite the proof of the crime.

In the Venezuelan mixed court the lay assessors, unlike their German counterparts, are only judges of the facts and not of the law. Much like in the jury

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§§ 183, 363 COPP. While in Spain juries have been freely permitted to answer questions which contain the nomen iuris of the charged offense and address mental states such as purpose, recklessness (dolo eventual) or negligence, Thaman (n. 25), 334-351, the Russian Supreme Court has, relying on a rather doubtful interpretation of the code, attempted to limit the jury to determining the naked facts relating to actus reus alone, while aggregating to the professional judge the task of qualifying the level of crime and deciding the guilty mental state. It has used this pretext to reverse countless judgments and the great majority of judgments of acquittal. See Thaman (n. 13), 339; Thaman (n. 32), 194-96.

This was the case in TSJ No.1356 (October 26, 2000) <http://www.tsj.gov.ve/Decisiones/scps-Octubre/1356-261000-C001028.htm>.

In the Case of Juan Carlos Moran Romero, tried on March 23, 2000, in the Criminal Circuit Court of Zulia in Maracaibo, the judge summarized the evidence in the verdict form, then added the following three paragraphs: 3.1. This presiding judge considers that the participation of the defendant was in the commission of the crime of QUALIFIED HOMICIDE foreseen and sanctioned in section 1 of § 408 Penal Code in force, such as the public prosecutor has formulated. 3.2. With respect to the accusation of the crime of Intentional Grave Injuries foreseen and sanctioned in § 417 of the Code the public prosecutor, the presiding judge considers that this has not been sufficiently demonstrated. 3.3. This PJ considers that the defendant acted consciously, discerningly and with intent although he did it with senseless motives. Not surprisingly, the jury returned just such a verdict (Verdict on File with Author).

Cf. 70 LOTJ, 459 UPK RSFSR. (I forgot to give you the paragraph numbers).

This essentially eliminates explicit jury nullification. See ALAN W. SCHEFFLIN, Jury Nullification: The Right to Say No, So. Cal. L. Rev. 45, 168 (1972); DARRYL K. BROWN, Jury Nullification Within the Rule of Law, Minn. L. Rev. 81, 1149 (1997). Russian legal scholars both today and before the revolution have supported the practice of jury nullification and the Supreme Court appears to have upheld the practice. Thaman (n. 13), 340-41.

§ 159 COPP. Cf. § 30(1) GVG (Germany).
court, it is the professional judge who gives the legal qualifications to the acts found proved and imposes sentence. Although § 22 COPP provides that the evidence is evaluated by the court according to its free conviction, observing the rules of logic, scientific knowledge and the maxims of experience, the jurisprudence of the Supreme Court has made it clear that this standard only applies to the single-judge and mixed courts and not to juries in their evaluation of the evidence.

"Citizen participation in jury trials, as ordered by the COPP, is nothing more than the exercise of popular sovereignty in the administration of justice. It is no longer the exercise of that sovereignty in the delegated form realized by a professional judge by virtue of his bureaucratic functions within his jurisdictional attributions, but a direct and sovereign mandate which emanates from the public conscience to the end of deciding a particular case with due process. For this reason one does not demand reasons and motivations in its procedure for evaluating the evidence given that the verdict it returns is based in the system of inner conviction. The case of the professional judge who exercises these functions in a delegated form is different, for he must explain the reasons of his decision to thus be able to control his acts."

While the Supreme Court has reversed many judgments of mixed and single-judge courts because the judge merely listed the evidence upon which the

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46 § 363 COPP. In the mixed court, dissenting judges, whether professional or lay, may file a separate opinion. Id. A Caracas public defender told me of a case in which the two lay assessors voted for acquittal and the professional judge filed a dissenting opinion and the case was upheld on appeal. Interview with MARÍA PARRA MACHADO, March 8, 2001, in Caracas Criminal Court. A young Caracas Criminal Circuit Court Judge told me that lay assessors disagreed with her many times. In a case of aggravated rape of a deaf mute, she thought the case was proved and filed a dissenting opinion when the two lay assessors voted for acquittal because of the lack of a test for semen. In another case she and one lay assessor voted for acquittal and the second lay assessor filed a dissenting opinion. The Court of Appeal found the defendant guilty in that case. Interview with MIRISLAVA BONILLA RUIZ, March 14, 2001, in Caracas Criminal Court. An older judge who worked under the old inquisitorial system indicated that the lay assessors never outvoted him. He found it odd that, when a lay assessor dissented, which occasionally happened, he had to draft their dissenting opinion. Interview with VICENTE MÚNICA AMADOR, March 14, 2001, in Caracas Criminal Court. Another older, experienced judge had only been outvoted once, in a narcotics case, when she thought the proof was overwhelming. The lay assessors, when asked for arguments, only said they did not want to get involved! The prosecutor did not appeal. MARÍA AMANDA PÉREZ DE MOTABÁN (n. 23).

47 Only with COPP did Venezuela finally abolish the formal or stafified rules of evidence which applied in its inquisitorial procedure, Exposición de Motivos (n. 1), 14; a transition made by Continental European countries with the introduction of trial by jury in the late 18th and 19th Centuries. FERRAGOLI (n. 12), 314-19. §§ 215, 216 COPP provide for the admission of all evidence as long as it is gathered in conformance with the law.

judgment was based and indicated it was convincing, without actually explaining why the inculpatory evidence was accepted over the exculpatory, the new Venezuelan system does not require the jury itself to give reasons as does the new Spanish system.

The difference between the standards for evaluation and justification of the factual conclusions reached by the jury and mixed (and single-judge) courts is also reflected in a difference in the appellate remedies available to challenge the judgments of the respective courts. Judgments of both conviction and acquittal returned by mixed and single-judge courts are subject to review on appeal which consists in a trial de novo in the Courts of Appeal, and the new judgment emitted by the Court of Appeal may be appealed in cassation to the Supreme Court (§§ 443, 449, 451 COPP). Judgments of conviction following jury verdicts are only subject to appeal in cassation and, in the case of unanimous jury verdicts,

49 TSJ No. 1124. Aug. 8, 2000 <http://www.tsj.gov.ve/Decisiones/scp/Agosto/1124-080800-C000870.htm>; TSJ No. 713. May 30, 2000 <http://www.tsj.gov.ve/Decisiones/scp/Mayo/713-300500-C000228.htm>; TSJ No. 1219. Sept. 27, 2000 <http://www.tsj.gov.ve/Decisiones/scp/Septiembre/1219-270900-C000959.htm>; TSJ No. 1282. Oct. 18, 2000 <http://www.tsj.gov.ve/Decisiones/scp/Octubre/1282-181000-C001061.htm>; TSJ No. 853. June 15, 2000 <http://www.tsj.gov.ve/Decisiones/scp/Agosto/150600-C000292.htm>. Several of these decisions dealt with transitional cases, investigated under the secret inquisitorial procedures of the old CEC yet tried under the adversarial rules of COPP. There the Supreme Court made it clear that the new system of «free reasoned conviction» for non-jury cases is more similar to the standard of «critical reason» or sana critica employed under the system of formal or «tariffed» rules of evidence, than the system of pure «inner conviction» employed by juries: «Application of the legal or tariffed system in this case is logical, given that the case was prepared in a written inquisitorial system. It would be violative of the principle of equality if, after having gathered and realized the evidence under the inquisitorial system, which denies the right to defense during the act, the state, availing itself, through the police, of all the prerogatives of the preliminary investigation and gathering the evidence behind the back of the defendant, were thus, during the trial, to give complete liberty to the judge to appreciate or evaluate this evidence under the system of free conviction.» TSJ No. 1401, November 7, 2000 (ROSELLSENHIN) <http://www.tsj.gov.ve/Decisiones/scp/Noviembre/1401-071100-C001142.htm>.

50 See § 61(1)(d) LOIT (Spain). On the difficulty Spanish juries have had in giving reasons and a critique of this provision, see THAMAN (n. 25), 364 et seq. Some of the first Venezuelan juries actually did provide reasons in their verdicts, perhaps with the understanding that § 22 COPP applied to them as well. Thus in one case, in which two police officers were accused of murdering two alleged delinquents and then planting guns on them, the presiding judge failed to include the self-defense theory of the defendants in the verdict form and the jury, which gave reasons for its verdict, also failed to mention this. The Supreme Court reversed, claiming the rights of the defense were violated «for the jury cannot absolutely ignore to consider the evidence which could favor the defendants and not take it into account in their decision, and worse, pretend that the defense offered no evidence.» The court also lamented the fact that no verbatim record is kept in Venezuelan trials for the purpose of appeals based on the evidence. TSJ. No. 1700. December 21, 2000 <http://tsj.gov.ve/Decisiones/scp/Diciembre/1700-211200-C001019.htm>.
they may only be challenged based on errors of law. But if the jury returns a non-unanimous majority verdict the law allows the defendant to appeal based on "the insufficiency of the evidence or its erroneous appreciation, which reveals the existence of a reasonable doubt as to the guilt of the defendant." Judgments of acquittal returned by the jury court, however, are final and not subject to any review. Jury acquittals in the new Spanish and Russian systems may be appealed in cassation, and the breadth of the grounds for such appeal have made it possible for the courts of cassation to overturn virtually any jury acquittal of which they do not approve. In upholding the finality of jury acquittals, the Venezuelan Supreme Court referred to the protection against double jeopardy: «The reasons for the profusion of cites and reasons for simply applying a norm which carries a clear mandate, as is § 454 of COPP, in the sense that judgments of acquittal by juries are not subject to any appeal at all, is due to the eminently inquisitorial formation of which we were victims in our schools of law which made us negate a series of principles and progressive developments in penal science which have their origin in the 19th century. For more than 100 years humanity has made important steps directed toward a due process characterized by the accusatory oral system which negates a series of dogmas and ideas which constrict procedural guarantees of the citizenry and precisely, in this area of obsolete institutions which were disgracefully still in force in Venezuela up to a short time ago when we were trained as lawyers.

Today Latin America is in a process of transforming its criminal justice and the universities are as well renewing the curriculum in the schools of law so that these basic principles in the modern codes of criminal procedure can be analyzed, understood and accepted as inherent in a democratic criminal procedure characterized by due process which obviously presupposes respect for the basic guarantees.

§ 454 COPP.

The most famous Spanish example of this is the reversal of the acquittal of MIKEL OTERO of the murder of two Basque policemen in 1997. See THAMAN (n. 25), 372-73, 379, 392. The Russian Supreme Court overrules nearly all acquittals of Russian juries, often ex officio on grounds not even pleaded by the prosecutor or aggrieved party. THAMAN (n. 13), 349.
of a criminal trial, one of which is the prohibition of double prosecution with which this judgment is dealing."

Judge Alejandro Angulo Fontiveros, in a strong dissenting opinion, felt that the non-appealability of jury acquittals violated, among other constitutional provisions, that of equal protection of the laws, that is, the right of the victim or aggrieved party to appeal acquittals. He points to the fact that victims may appeal acquittals of less serious cases tried by single-judge and mixed courts, and even acquittals of aggravated murder cases if tried by single-judge courts under the special procedure for flagrant cases.

VI. Conclusion

Venezuela's new system of lay participation in criminal trials has been functioning now for over two years. In the year 2000, the first complete year of its functioning, 292 jury trials (62 in Caracas) and 1,233 trials before mixed courts (233 in Caracas) took place. Juries returned 67% guilty verdicts and 33% acquittals, of which 74% were unanimous verdicts and 26% by majority vote. Mixed courts convicted only 59% of the time and returned 41% acquittals, though 91% of their judgments were unanimous as opposed to 9% with a dissenting vote. These statistics are quite surprising in comparative perspective. Normally juries would be assumed to acquit more than mixed courts. Yet, as one can see from the

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54 TSV. No. 1455. November 8, 2000. The Supreme Court, in upholding the non-appealability of jury acquittals, also referred to Art. 5 of the Constitution of 1999, guaranteeing popular sovereignty in distinguishing jury acquittals from decisions of professional courts. See n. 48 and accompanying text.

55 TSJ. No. 1379, October 31, 2000 (n. 52), ANGULO FONTIVEROS, dissenting.

56 If a defendant is arrested in flagrante delicto or is brought directly to the control judge who confirms the fact of flagrancy, whereupon the case is immediately set for trial before a single-judge, even it seems, in cases that would otherwise be within the competence of the jury or mixed court. §§ 257, 374 COPP. See ERIC LORENZO PÉREZ SARMIENTO (n. 1), 416-17. This procedure applied to murder cases would, indeed, seem to violate equal protection, for the fact of flagrancy in homicide cases still does not resolve the issue of guilt, which usually depends on issues of imputability, intent, recklessness, etc., which a trier of fact may have difficult deciding even if the defendant is arrested red-handed. The flagrant cases are often resolved, under COPP, through the new procedure of admission of the facts, a form of plea-bargaining, in which the defendant gets a discount of one-third on sentences for crimes against the person or narcotics crimes and from one-third to one-half for other crimes. § 376 COPP.

57 Oficina Nacional de Participación Ciudadana (statistics on file with author).

58 In Russia juries acquit around 20% of the time, the mixed court, on the other hand, in less than 1.5% of cases. THAMAN (n. 13), 348.
statistics, most mixed court acquittals are joined in by the professional judge in Venezuela.

Several conclusions are possible. First, if lay assessors are chosen randomly, for use in only one trial, they will perhaps act in a more juror-like manner, that is, they will feel more comfortable in sticking with their opinions despite pressure from the professional judge. Perhaps, also, the results reflect the Venezuelan judiciary, which appears to be staffed predominantly by young and female judges who have not become case-hardened or conditioned by the bureaucratic hierarchical pressures of the civil service judiciary.60

The high acquittal rates, clearly, reflect one of two states of affairs. Either lay and professional judges are afraid to convict because of fears of reprisals from defendants or their friends or associates in the multitudinous gangs and organized crime rings in Venezuela, as has been indicated by some judges, or the cases come to the courts poorly investigated. COPP, from the outset, was criticized as being too liberal and for having led to the release of too many dangerous criminals62, but no system of criminal procedure will work properly if the society itself is plagued by inequality, huge differences between rich and poor, educated and uneducated, or by racial or class tensions. Yet progressive European legal scholars continue to be blind to the role lay participation (and particularly the classic jury)

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59 Questionnaires returned by 927 lay assessors and jurors after they participated in a trial revealed that 85.21% did not change their minds during deliberations (as opposed to 10.03%), yet nearly all felt respect for the professional judge with respect to his or her decisions and actions (98.4%) and 92.33% were in agreement with the result and the imposition of punishment. See Encuesta Inicial (n. 21).

60 75 Venezuelan judges were fired and 377 suspended from January 1, 1999 through April 1, 2000, in a campaign to "purify" the judiciary which was widely accused of delays and corruption. Venezuelan judiciary purged: 111 judges suspended or fired. Agence France-Presse. March 30, 2000. 2000 WL 2764027.

61 Venezuelan police are not capable of responding to challenges of modern criminality and are overwhelmed by the amount of cases they must investigate. A poll in 1991 showed that 54% of people thinks capture of criminals is impossible and 68% think that the assailant of whom he is a victim is a policeman. MARIA ESTHER GUÁ T. (n. 22), 110-11. Another reason may be that, whereas the public defenders prepared for the introduction of the new adversary procedure in workshops organized by public defenders from the U.S., the office of the public prosecutor spent all its energy in trying to stop the law from being enacted! PARRA MACHADO (n. 46); DEL VALLE MARQUINA (n. 59). See also OBERTO (n. 7), 175, 205.

62 CORDOVA (n. 22).

63 And in an egalitarian society where the above problems are minimized, and a liberal criminal policy is in place, any system will likely be adequate. Thus, to the extent FERRAJOLI's system of criminal law can be replicated in the substantive criminal law, the procedure becomes less relevant (n. 12), 326 et seq. The old-fashioned Dutch inquisitorial system is a good example, here.
can play as a catalyst in the transition to a truly garantista system of the administration of justice\textsuperscript{64}. Yet if the judicial branch continues to resist true lay participation in the name of positivism, «science», or avoidance of acquittals, then, unlike in the executive and legislative branches, there will be no true checks and balances on judicial power\textsuperscript{65}. And what will the Dutch do if the pendulum swings and their criminal policy begins to follow the U.S. model?

\textit{«Trial by jury was eliminated from the Venezuelan Code of Criminal Procedure after this article went to press. Ley No. 54, Ley de Reforma Parcial del Código Orgánico Procesal Penal.»}

Gaceta Oficial de la República Bolivariana de Venezuela. No. 5552 (November 12, 2001).

\textsuperscript{64} Cf. FERRAJOLI (n. 12), whose otherwise magnificent work virtually ignores this aspect of the criminal trial. The topic is getting increased attention, however, in Latin America. See RICARDO JUAN CAVALLERO (n. 4).

\textsuperscript{65} The ruling Popular Party in Spain has called for the conversion of its jury court into a mixed court but this plank in its platform has recently been placed on hold. See ANABEL DÍEZ /JULIO M. LÁZARO, El Pacto de la Justicia mantiene en manos del Congreso la elección del Poder Judicial, El País, May 29, 2001, 15.